IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1454 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)

Versus

JANTILAL DEVJIBHAI JOSHI @ JIVANGIRI SURESHGIRI – Respondent (s)

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Appearance :

Mrs.Hansa B. Punani, Ld.APP for Appellant(s) : 1,

None for Respondent (s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA
and
HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 07/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. By filing instant appeal under Section 378 of the Code of Criminal Procedure ('the Code', for short), appellant- State of Gujarat has called in question the judgment and order dated 24.04.2003 rendered in Sessions Case No.13 of 2002 by the learned Additional Sessions Judge, 3rd Fast Track Court, Junagadh at Porbandar by which respondent ('accused' for short) came to be acquitted of the offences punishable under Section 302 and 201 of the Indian Penal Code ('IPC' for short).

2. The prosecution case as disclosed in FIR and unfolded during trial is as under:-

The deceased Devshi Aahir was working in the “Gaushala” situated in the sim of Dharampur, Porbandar. The accused had quarreled with the

deceased as the deceased was against selling of ganja in the “Gaushala” where the accused was inviting his customers for the purpose of selling ganja and enjoying ganja. As the deceased was against these activities of the accused, he killed the deceased by inflicting sword blows and thereafter by digging a pit buried the dead body of the deceased. The accused further held out a threat to Popat Rabari and Sura Rabari, who had witnessed the incident, not to tell about the same to anybody.

3. The complaint for the aforesaid incident was filed by Ravjibhai Ramjibhai before Udhyognagar where it was registered vide C.R.No.I-46/2001 against the accused for commission of offences punishable under Sections 302 and 201 of IPC. On registration of the complaint, the investigation was carried out. During the course of investigation, statements of three witnesses were recorded. The dead body was taken out from the pit at the instance of the accused as he had shown his willingness to discover the dead body from where it

was buried. To that effect, discovery panchnama was drawn in the presence of panch witnesses and thereafter inquest was held on the dead body of the deceased, which was taken out from the pit. Thereafter same was sent for autopsy to Jamnagar Medical College. Further, as the accused had shown his willingness to show weapon which was used for commission of crime, discovery panchnama was drawn at his instance and sword was recovered in the presence of panchas. At the end of investigation, as sufficient incriminating evidence was found against the accused, he came to be charge-sheeted before the concerned learned Judicial Magistrate First Class for the offences punishable under Sections 302 and 201 of IPC.

4. As the offence punishable under Section 302 of Indian Penal Code is exclusively triable by the Court of Sessions, the concerned learned JMFC committed the case to the Court of Sessions, Junagadh District at Porbandar.

5. The learned Sessions Judge, Porbandar, to whom

the case was made over for trial, framed charges against the accused. The charges were read over and explained to the accused who pleaded not guilty and claimed to be tried and thereupon he was put to trial and tried by the learned Additional Sessions Judge (3rd Fast Track Court), Junagadh at Porbandar.

6. To prove the culpability of the accused, the prosecution has examined as many as 17 witnesses and relied upon their oral testimony, details of which have been given para 2 of the impugned judgment and order. To prove the charge against the accused, the prosecution has also produced number of documents and relied upon the contents thereof, details of which have been discussed in Para-3 of the judgment and order.

7. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the

Code. In his further statement he denied the case of the prosecution in toto. He neither led any evidence nor examined any witness in support of his defence.

8. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the learned trial Judge came to the conclusion that homicidal death of deceased Devshi Aahir has been proved by the prosecution. However, according to the learned Trail Judge, there is no eye witness to the incident and the circumstantial evidence on which the prosecution has relied upon does not form the entire chain, and there is no evidence worth consideration against the accused for commission of the offences as alleged against him. He, therefore, held that the guilt of the accused is not established and resultantly, he acquitted the accused of the offences with which he was charged, giving rise to instant appeal at the instance of the appellant- State of Gujarat.

9. We have considered the submissions advanced by learned A.P.P. Mrs. Hansa Punani, for the appellant-State of Gujarat. We have also perused the impugned judgment and order and the set of evidence supplied by the learned APP during the course of her submission. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record which is read and reread by us with reference to broad and reasonable probabilities of the case.

10. The fact that deceased Devshi Ahir died a homicidal death is not in dispute. In this connection, the prosecution has examined P.W. No.12, Dr.Chetan Maganbhai Dhariya at Exh.56 , who has performed autopsy on the dead body of the deceased. He has also prepared P.M. report which is on record at Exh.26. A perusal of his testimony at Exh.56 and autopsy report at Exh.26, reveals that deceased had received as many as 5 external injuries on the vital part of his body and he died because of multiple chop injuries on his head.

Therefore, there is reason to believe that deceased succumbed to multiple injuries received by him on head. Therefore, it has to be held that deceased died a homicidal death.

11. It is settled principle of law that in order to sustain conviction on the basis of circumstantial evidence, prosecution must fulfill three conditions:

(i)the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(ii)those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(iii)the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it

should also be incapable of explanation on any other hypothesis than that of the guilt of the accused. Further, in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. The above principles are laid down by the Supreme Court in the case of Jaharlal Das v.

State of Orissa, AIR 1991 SC 1388.

12. It is also one of the settled principles of law that witnesses may tell lie but not circumstances. The Court must adopt cautious approach for basing conviction on circumstantial evidence. The Supreme Court has reiterated it in the case of State of Haryana v. Ved Prakash, AIR 1994 SC 468.

13. The Supreme Court in the case of Ramkumar Madhusudan Pathak v. State of Gujarat, (1998) 7 SCC 702 has aptly and elaborately laid down the principles as to which are the circumstances establishing guilt of the accused.

14. The Supreme Court in the very well known case of Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984 SC 1622, has laid down following five principles to base conviction on the circumstantial evidence:

“(i)the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established;

(ii)the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv)they should exclude every possible hypothesis except the one to be proved, and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground or the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

15. In the latest decision of the Supreme Court in the case of Jaipal v. State of Haryana, (2003) 1 SCC 169, the Supreme Court has held that merely because the accused could have had a motive for causing death of the deceased it would not by itself be enough to sustain the finding of guilt against him.

16. Keeping in forefront the aforesaid principles clearly elucidated by the Supreme Court, we may now advert to the evidence adduced by the prosecution to find out whether the prosecution has successfully established the chain of evidence to base conviction on circumstantial evidence adduced by it.

17. To prove the case against the accused on the basis of the circumstantial evidence, the prosecution has pitted the following three circumstances against the accused:

(i) accused has shown his willingness to show the place where the dead body of the deceased was

buried in the pit and ultimately it was found out from the said place in the presence of panchas by drawing discovery panchnama at the instance of the accused.

(ii) Accused has shown his willingness to show the place where he has hidden the weapon i.e. sword which was used by him in commission of offence and ultimately it was also found out from the said place in the presence of panchas by drawing discovery panchnama at the instance of the accused.

(iii) the sword which was found out after drawing discovery panchnama sent to F.S.L. which was having found blood stained marks.

18. So far as the first circumstance which is alleged against the accused by the prosecution is concerned, the prosecution has examined P.W.No.5, Harish Kanabhai, whose evidence is recorded at Exh.42. This witness is panch witness. In his deposition before the Court, he has not supported the discovery panchnama which is on record vide Exh.43. According to him the accused had not made

disclosure statement in his presence. The learned Trial Judge has therefore observed that place where the dead body was found by the investigating officer, was know to him from the very beginning and therefore, no reliance can be placed upon the said discovery panchnama. On a re-appreciation of the aforesaid evidence of P.W.No.5 Harish Kanabhai, according to us circumstance pitted against the accused was not established by the prosecution.

19. So far as the second circumstance i.e. discovery panchnama of the weapon i.e. sword which is used for commission of offence is concerned, prosecution has examined P.W.No.3 Rakeshbhai Ramchandra at Exh.9. A perusal of his evidence it is seen that he has also not supported the discovery panchnama which is on record at Exh.10. On the basis of this piece of evidence the second circumstance pitted against the accused is also not established by the prosecution.

20. Now the last circumstance which is the F.S.L. report of the sword having blood stain marks. A

compilation of F.S.L. report at Exhs.30 to 37 it seems that there was no blood stain marks on the sword , therefore the alleged circumstance which is pleaded by the prosecution is also not proved.

21. On over all appreciation of the evidence, we are of the view that there is not even a single circumstance available on the entire length and breadth of the prosecution evidence to connect the accused with the offence with which he was charged.

22. Seen in the above context, we are of the opinion that the learned trial Judge has rightly appreciated the evidence and reached to the just and correct conclusion which does not warrant interference of this Court in an acquittal appeal filed by the appellant – State of Gujarat. We find ourselves in complete agreement with the ultimate conclusion and resultant order of acquittal recored by the learned trial Judge as according to us no other conclusion is possible except the one reached

by the learned trial Judge.

23. This being an acquittal appeal, we cannot upturn the finding of the learned trial Judge unless we are able to point out that the reasoning adopted by him is unsustainable or that the view taken by him is unreasonable. In instant case, the learned APP could not persuade us to upset the finding recorded by the learned trial Judge or take a view contrary to the view taken by the learned trial Judge. According to us, the view expressed by the learned trial Judge is most reasonable.

24. It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are

perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (See Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned trial Judge are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

25. In the case of RAM KUMAR V. STATE OF HARYANA, reported in AIR 1995 SC 280, Supreme Court has held as under:

> "The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the

High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

26. It may be noted that this is an acquittal appeal in which Court would be slow to interfere with the order of acquittal.

Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly, when the evidence has not inspired confidence of the learned Judge. As this Court is in general agreement with the view expressed by the learned trial Judge, it is not necessary for this Court either to reiterate the evidence of the prosecution witnesses or to restate reasons given by the learned trial Judge for acquittal and in our view, expression of general agreement with the view taken by the learned trial Judge would be sufficient in the facts of the present case for not interfering with the judgment of the learned trial Judge and this is so, in view of the decisions rendered by the Hon'ble Supreme Court in the case of GIRJA NANDINI DEVI AND OTHERS V. BIJENDRA NARAIN

CHAUDHARI, AIR 1967 SC 1124 and STATE OF KARNATAKA V. HEMA REDDY AND ANOTHER, AIR 1981 SC 1417.

27. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned trial Judge for acquitting the accused. Suffice it to say that the learned trial Judge has given cogent and convincing reasons for acquitting the accused and the learned A.P.P. has failed to dislodge the reasons given by the learned trial Judge and convince this Court to take a view contrary to the one taken by the learned trial Judge.

28. Seen in the above context, we do not find any valid reason or justifiable ground to interfere with the impugned judgment and order acquitting the accused of the offences

with which he was charged. Hence, leave to appeal deserves to be refused by dismissing the appeal in limine.

29. For the foregoing reasons, leave to appeal is refused. Appeal is dismissed at the threshold.

(A.M. Kapadia, J.)

(Smt. Abhilasha Kumari, J.)

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